Office - Supreme Court, U. S.
FILED
MAY 21 1945
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1299-1300

SOUTHERN TRANSPORTATION COMPANY, as Owner of the Barge "CUTLER",
Libellant-Appellee,

—against—

M/V "JULIUS H. BARNES", ERIE & ST. LAWRENCE CORPORATION,
Claimant-Appellant,

and

"CALATCO NO. 2" and CANAL LAKES TOWING CORPORATION,
Claimants-Respondents-Impleaded-Appellees.

ERIE & ST. LAWRENCE CORPORATION, Owner of the M/V "JULIUS H. BARNES",
Libellant-Appellant,

—against—

"CALATCO NO. 2" and CANAL LAKES TOWING CORPORATION,
Respondents-Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WILBUR E. DOW, JR.,
Counsel for Petitioner.

Dow & Symmers,
William G. Symmers,
Of Counsel.

The Court Press, N. Y. C.

INDEX.

PAGE

Petition for Writ of Certiorari 1

A. Summary Statement of the Matter Involved..... 2

1. The Opinions Below 2
2. The Jurisdiction of This Court 2
3. The Statute Involved 2
4. Statement of Facts 2

B. The Appeal Proceedings Below 4

C. The Questions Presented 4

D. The Reasons Relied on for the Allowance of the Writ 7

E. The Accompanying Documents 9

Brief for Petitioner 11

The Jurisdiction of this Court 12

The Facts 12

POINT I—The Circuit Court of Appeals in a *per curiam* opinion has wrongly affirmed a relaxation of several of the most important Rules of the Road at Sea established by International Convention and thereafter firmly adhered to by this Court in every similar case ever brought before it, which, if permitted to stand, can only result in confusion among navigators and seamen generally. Its importance to seamen and Courts of Admiralty throughout the world cannot be overemphasized 12

A. The law is settled that the privileged vessel must maintain her course and speed as long as it is possible for the burdened vessel to avoid collision by righting her helm, in the absence of some distinct indication that the burdened vessel is about to fail in her duty, as this Court has often and firmly held 12

PAGE

B. The Rules of the Road were made for seamen of all nationalities and so arranged as to operate equally well in daylight or in darkness, where the nature of approaching vessels, their nationality, customary home waters, speed, horsepower or maneuverability cannot be known. If we are to inject the element of maneuverability into the Steering and Sailing Rules, the result will be chaotic, not to say incomprehensible, to seamen the world over 24

C. The faults of the "Calateo No. 2" were both grievous and many and clearly account for the collision; under the prevailing rule in this Court there was no ground for divided damages..... 29

LAST POINT—The prayer of the petitioner should be granted 32

Appendix 33

TABLE OF CASES CITED:

Ariadne, The, 80 U. S. 475; 20 L. Ed. 542 .....8, 30

Belden v. *Chase*, 150 U. S. 674 .....5, 6, 7, 8, 13

Binghampton, The, 271 Fed. 69 (1921, C. C. A. 2), 8, 13, 15, 17, 18, 19

Boston Socony, The, 63 F. (2d) 246 (1933, C. C. A. 2), 13, 19, 20, 21

Britannia, The, 153 U. S. 130 .....5, 8, 13

Bronx, The, 250 Fed. 843 (C. C. A. 2) 6, 26

Chamberlain v. *Ward*, 62 U. S. 548, 16 L. Ed. 211..... 8

Chicago, The, 125 Fed. 712, 60 C. C. A. 480 (1903, C. C. A. 2) 8, 13

Commonwealth & Dominion Line, Ltd. v. *The Seaboard Transportation Co.*, first reported in 258 Fed. 707 (1919), and upon rehearing, in 275 Fed. 617 (1921).....14, 15, 16

Delaware, The, 161 U. S. 459, 16 Sup. Ct. 519, 40 L. Ed. 771 (1893) 5, 7, 8, 12, 15, 16, 17

Frederick H., The, 4 F. Supp. 593 (E. D. N. Y. 1933)..26, 27, 31

PAGE

Genesee Chief v. *Fitzhugh*, 53 U. S. 443; 13 L. Ed. 1058... 8

Haida D. C., The, 191 Fed. 623, affirmed 196 Fed. 1005, 115 C. C. A. 376 (1912, C. C. A. 2) 8

Highgate, The, 62 L. I. 841, 6 Asp. Mar. L. Cas. 512 (1890) 8

Hokendauqua, The, 270 Fed. 273 (1919, C. C. A. 2).....13, 15

Holland v. *Penn. R. R. Co.*, 47 Fed. Supp. 173, 1942 AMC 1430 . . ..27, 28

Hygrade No. 20, Inc., The v. *Steamtug Newton, et al.*, 1941 AMC 229 .....6, 25, 26

John I. Brady, The, 131 Fed. 235 (C. C. A. 3).....6, 27

Louisiana, The v. *Fisher*, 62 U. S. 1, 16 L. Ed. 29..... 8

Northfield, The, 154 U. S. 629 .....5, 8, 13

Olympic, The (1915), A. C. 385, 84 L. J. P. 49; 112 L. T. 49; 31 T. L. R. 54; 12 Asp. M. L. C. 580, affirmed in the House of Lords (1913) P. 214 8

Oregon, The, 158 U. S. 186, 15 Sup. Ct. 804; 39 L. Ed. 943 8

Pennsylvania, The v. *Troop*, 86 U. S. 125 ..... 6, 8

Piankatank, The, 87 F. (2d) 806 (1937, C. C. A. 4)...8, 13, 21, 22

Winfield S. Cahill, The, 258 Fed. 318 (C. C. A. 2).....6, 25

OTHER AUTHORITIES CITED:

Act of February 13, 1925, Section 3(a) 2

Act of June 7, 1897, 30 Stat. 101, Title 33 U. S. Code:
Sections 154-231 (Inland Rules of the Road) 2
§204, Art. 19 .....5, 5n, 6, 22, 25, 26, 29, 30, 31, 33
§206, Art. 21 .....5n, 24, 33
§207, Art. 22 .....25, 33
§208, Art. 23 .....25, 33
§221, Art. 29 33

International Rules, 38 U. S. Code, Sections 61-141, 26 Stat. 326 .....2, 32

LaBoyteaux, Rules of the Road at Sea 22, 23, 30

Rules of the Road at Sea 9, 12, 13, 24, 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No.

SOUTHERN TRANSPORTATION COMPANY, as Owner of the Barge "CUTLER",
Libellant-Appellee,

—against—

M/V "JULIUS H. BARNES", ERIE & ST. LAWRENCE CORPORATION,
Claimant-Appellant,

and

Tug "CALATCO No. 2" and CANAL LAKES TOWING CORPORATION,
Claimants-Respondents-Impleaded-Appellees.

ERIE & ST. LAWRENCE CORPORATION, Owner of the M/V "JULIUS H. BARNES",
Libellant-Appellant,

—against—

Tug "CALATCO No. 2" and CANAL LAKES TOWING CORPORATION,
Respondents-Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Erie & St. Lawrence Corporation, respectfully shows to this Honorable Court as follows:

A. Summary Statement of the Matter Involved.

Your petitioner, Erie & St. Lawrence Corporation, prays that a writ of certiorari issue to review the decree of the Circuit Court of Appeals in the above maritime collision case in which both vessels involved were held at fault.

1. The Opinions Below.

The *per curiam* opinion of the Circuit Court of Appeals is reported in 147 Fed. (2d) 545. The District Court's opinion is reported in 58 Fed. Supp. 864.

2. The Jurisdiction of This Court.

The decree of affirmance below was filed on February 21st, 1945. Jurisdiction of this Court is invoked under Section 3(a) of the Act of February 13, 1925.

3. The Statute Involved.

The statute involved is the Act of June 7, 1897, 30 Stat. 101, Title 33 U. S. Code Sections 154-231, known as the Inland Rules of the Road, the pertinent sections of which, identical with the International Rules, 38 U. S. Code Sections 61-141, 26 Stat. 326, are set forth in Appendix, *infra*, page 33.

4. Statement of Facts.

The material findings of the District Court, affirmed below, may be summarized as follows:

The motor vessel "Julius H. Barnes" (owned by petitioner and herein called the "Barnes"), a twin-screw steel bulk cargo vessel, was proceeding on the night of December 10, 1942, from the East River, New York to Bayonne,

New Jersey. The Tug "Calateo No. 2", with a seagoing barge on her starboard side, was proceeding from Perth Amboy, New Jersey, toward Red Hook Anchorage, New York Bay. Both vessels were displaying proper navigation lights. As they approached each other, the "Barnes" blew a single blast when the tug and tow were about half a mile away, but the tug did not answer. The first single blast of the "Barnes" was intended to indicate to the tug that the "Barnes" would pass on the port side of the tug. The "Barnes" blew a second single blast when the tug and tow were less than ¼ mile away (about 400 yards). The second one-blast of the "Barnes" was a crossing signal and the "Barnes" was then off the starboard bow of the tow. The captain of the "Barnes" then felt that there was danger of a collision, but continued full speed ahead, veering slightly to the right. When the tug answered the second one-blast of the "Barnes" with a danger signal and two, he reversed the engines of the "Barnes" and swung the bow of the "Barnes" to the right. The tug had stopped her engines when she blew the danger signal and two. The captain of the "Barnes" ordered full speed ahead on his starboard engine so as to swing in an arc across the bow of the tow. The tug blew a second danger signal and reversed her engines. The tug did not change her course at all during these maneuvers and her first change in speed was when she stopped her engines and blew the first danger signal.

The District Judge concluded:

> "The tug 'Calateo No. 2' was at fault in not seeing the 'Barnes' sooner than she did; in not answering promptly the first single blast of the 'Barnes', and in not changing her course or speed or giving way to the 'Barnes', the privileged vessel."
>
> "The 'Barnes' was at fault in that she continued to travel at a high rate of speed towards the tow and barge, although the tug had not answered the first

> one-blast signal of the 'Barnes'; in that the 'Barnes' blew no signal to inform the tug that the 'Barnes' did not understand the intention or course of the tug; in that the master of the 'Barnes' when he realized that there was danger of collision, did not immediately reverse his engines and blow a danger signal; in that the speeding 'Barnes' unnecessarily crowded the slow moving tow in attempting to pass on the port side of the tug, although there was plenty of water in which the more maneuverable 'Barnes' could have set her course to pass the tow a greater distance off."

No appeal was taken by the tug from the finding that it was to blame.

B. The Appeal Proceedings Below.

The Court below, composed two-thirds of visiting judges, stated at the argument of the appeal that it would have little time to decide the case because the judges were separating that week, and its *per curiam* opinion summarily disposed of the case with the following comment:

> "It is sufficient for us to say that we approve both what the district judge did and the way he did it, and that on his opinion and for the reasons he gave, we affirm his decrees."

C. The Questions Presented.

The questions here involved are of utmost importance to the regulation of domestic and international waterborne commerce and traffic, and involve a determination of whether the mandates of the heretofore uniformly applied and rigidly respected Rules of the Road at Sea, as understood and practiced by mariners throughout the world, may be disregarded so that responsibility for a collision falling within the fixed category of the applicable

mandates of the Rules may be decided, not by adherence to the Rules, but as if it were a case of "special circumstances" and determined in the light of hindsight. Is the certainty of the Rules to be displaced by the uncertainty and confusion of judicial legislation ignoring the statutory duty of the privileged vessel to maintain her course and speed, and that of the burdened vessel to keep out of the way, when the "vessels are crossing so as to involve risk of collision"?

1. Where the burdened vessel fails to abide by the Starboard Hand Rule is the privileged vessel at fault for maintaining her course and speed?[1]

If, so, every crossing situation becomes a case of "special circumstances" as soon as two vessels approach on crossing courses "so as to involve risk of collision", and the Starboard Hand Rule is discarded for a subjective and confusing test amounting to "every man for himself, and let the Courts determine in each case who, if anyone, acted most prudently in the circumstances". The decisions of this Court in *The Delaware*, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771 (1893); *The Britannia*, 153 U. S. 130; *Belden* v. *Chase*, 150 U. S. 674; and *The Northfield*, 154 U. S. 629, are thus overthrown.

2. Is the Starboard Hand Rule (Article 19) no longer mandatory where a burdened vessel is less maneuverable than a privileged vessel?

If so, crossing vessels would be charged with the impossible duty of determining relative maneuverability, as

---

[1] *Article 19 of the Rules*: When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way of the other. (33 U. S. Code Section 204.)

Article 21: Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed. (33 U. S. Code Section 206.)

here, where the collision occurred in the dark, something never before required by this Court and consistently rejected by the Circuit Courts of Appeals whenever considered by them, as in *The Bronx*, 250 Fed. 843 (C. C. A. 2); *The Winfield S. Cahill*, 258 Fed. 318 (C. C. A. 2); *The John I. Brady*, 131 Fed. 235 (C. C. A. 3) and *The Hygrade No. 20, Inc.* v. *Steamtug Newton, et al.*, briefly reported in 1941 AMC 229. If the decision of the District Court in the case at bar as affirmed *per curiam* by the Circuit Court of Appeals is allowed to stand, the decisions above referred to are overthrown.

3. Where one vessel is guilty of gross statutory fault (failure to maintain a lookout and to abide by the Starboard Hand Rule), and the other vessel guilty of no statutory fault, and only slight error, if any, in judgment, is it still the settled rule of this Court that the vessel guilty of such gross fault shall be found solely liable?

The District Court found the burdened vessel had no lookout, came right ahead without altering course, in violation of the Starboard Hand Rule and struck the port side of the privileged vessel. The failure to have a lookout and the subsequent neglect to act when required, clearly accounts for the collision. As this Court first held in *The Pennsylvania* v. *Troop*, 86 U. S. 125, and has since always affirmed, a vessel guilty of a statutory violation is not entitled to exoneration or divided damages unless she can show that the violations not only *did* not but *could* not have contributed to the collision. No attempt by counsel for the offending vessel was made to meet that requirement of this Court, long mandatory here, and the District Court declined to apply the test.

This Court held in *Belden* v. *Chase*, 150 U. S. 674, 699, citing *The Pennsylvania, supra*, and in many subsequent cases:

> "• • • And it is the settled rule in this court that when a vessel has committed a positive breach of

statute, she must show not only that probably her fault did not contribute to the disaster, *but that it could not have done so. The Pennsylvania* v. *Troop*, 86 U. S. 19 Wall. 125, 136; *Richelieu & O. Nav. Co.* v. *Boston Marine Ins. Co.*, 136 U. S. 408, 422.

Obedience to the rules is not a fault even if a different course would have prevented the collision, and the necessity must be clear and the emergency sudden and alarming before the act of disobedience can be excused. Masters are bound to obey the rules and entitled to rely on the assumption that they will be obeyed, and should not be encouraged to treat the exceptions as subjects of solicitude rather than the rules. *The Oregon* v. *Rocca*, 59 U. S. 18 How. 570."

D. The Reasons Relied on for the Allowance of the Writ.

It is respectfully submitted that this Court should take up this case on certiorari and set aside the *per curiam* opinion of the Circuit Court of Appeals, which affirms the decree of the District Court which divided damages between the two vessels, and hold the respondent solely liable, on the following grounds:

1. This case involves two vessels, one of which, the "Calateo No. 2", the District Court found had no lookout and as the burdened vessel, violated the Starbord Hand Rule. The other vessel, the "Julius H. Barnes", for brevity called "Barnes", the District Court found to be the privileged vessel but because she was more maneuverable that she should have relinquished her privilege and altered her course and speed, both contrary to the mandate of the statute. As the collision occurred at night and respective maneuverability is purely hindsight, for which the statute makes no provision, such a rule is a complete innovation upon the Rules and contrary to the established decisions of this Court and in direct conflict with such landmark cases as *The Delaware*, 161 U. S. 459, 16

Sup. Ct. 516, 40 L. Ed. 771 (1893); *The Britannia*, 153 U. S. 130; *The Northfield*, 154 U. S. 629; *Belden* v. *Chase*, 150 U. S. 674; and in the English Courts of Admiralty, *The Highgate*, 62 L. T. 841, 6 Asp. Mar. L. Cas. 512 (1890); *The Olympic*, (1915) A. C. 385, 84 L. J. P. 49; 112 L. T. 49; 31 T. L. R. 54; 12 Asp. M. L. C. 580, affirmed in the House of Lords (1913) P. 214.

It is also in direct conflict with the decisions of the Circuit Courts of Appeal in the following cases, among others; *The Binghampton*, 271 Fed. 69 (1921, C. C. A. 2); *The Chicago*, 125 Fed. 712, 60 C. C. A. 480 (1903, C. C. A. 2); *The Haida D. C.*, 191 Fed. 623, affirmed 196 Fed. 1005, 115 C. C. A. 376 (1912, C. C. A. 2); and *The Piankatank*, 87 F. (2d) 806 (1937, C. C. A. 4).

2. The Circuit Court of Appeals has wrongly affirmed a decision of the District Court which detracts from the necessity of maintaining a lookout at night, even though such failure resulted in the inability of the burdened vessel to see the privileged vessel in time to take the positive action required by the statute and was a direct cause of the collision. This is in direct conflict with the decisions of this Court in *The Ariadne*, 80 U. S. 475; 20 L. Ed. 542; *The Oregon*, 158 U. S. 186, 15 Sup. Ct. 804; 39 L. Ed. 943; and numerous subsequent decisions of this Court and the Circuit Court of Appeals.

3. The Circuit Court of Appeals has wrongly affirmed a decision of the District Court on an important question of the laws of evidence, presumption and burden of proof, all contrary to well recognized principles of law and particularly to those stated by this Court to be its settled rule in *The Pennsylvania* v. *Troop*, 86 U. S. 125, 136; *The Ariadne*, 80 U. S. 475, 20 L. Ed. 542; *The Louisiana* v. *Fisher*, 62 U. S. 1, 16 L. Ed. 29; *Chamberlain* v. *Ward*, 62 U. S. 548, 16 L. Ed. 211; and *Genesee Chief* v. *Fitzhugh*, 53 U. S. 443; 13 L. Ed. 1058.

4. All the questions presented herein are of the greatest importance to navigators, seamen and courts of admiralty throughout the world. The Rules of the Road at Sea were established by International Convention and made the law of the flag of every maritime nation throughout the world. They thus constitute the most evenly adjudicated body of international law in existence and should not be varied without the express consent of this Court with full knowledge of the international importance of what it is doing.

E. The Accompanying Documents.

A certified copy of the transcript of the record of the District Court and Circuit Court of Appeals is presented herewith.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court on a day to be designated for its review and determination, a full and complete transcript of all proceedings in said Circuit Court of Appeals in the cases entitled in that Court: Southern Transportation Company, as Owner of the Barge "Cutler", Libellant-Appellee, against M/V "Julius H. Barnes", Erie & St. Lawrence Corporation, Claimant-Appellant, and Tug "Calateo No. 2" and Canal Lakes Towing Corporation, Claimants-Respondents-Impleaded-Appellees; and Erie & St. Lawrence Corporation, Owner of the M/V "Julius H. Barnes", Libellant-Appellant, against Tug "Calateo No. 2" and Canal Lakes Towing Corporation, Respondents-Appellees, Nos. 210-211, which cases were tried together; that the decision of the said Circuit Court of Appeals rendered on January 22, 1945, be reversed and the decree of the District Court, dividing

damages between the two vessels, be reversed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as may be just.

And your petitioner will ever pray, etc.

Dated, New York, May 19, 1945.

ERIE & ST. LAWRENCE CORPORATION,
Petitioner.

By WILBUR E. DOW, JR.,
Counsel for Petitioner.